IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-495

COLE HOSPITAL INC.,

Petitioner,

vs.

SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Respondent.

JEFFERSON MEMORIAL HOSPITAL ASSOCIATION,

Petitioner,

vs.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioners, Cole Hospital Inc. and Jefferson Memorial Hospital Association, petition for a writ of certiorari to review the decisions of the United States Court of Appeals for the Seventh Circuit in these cases.

OPINIONS BELOW

The decision of the court of appeals (App. A, pp. A4-A11) is not reported. The decisions of the district court (App. B, pp. A12-A18) are not reported.

JURISDICTION

The decision of the court of appeals (App. A, pp. A4-A11) was entered on July 13, 1978. A petition for rehearing was denied on August 11, 1978 (App. A, pp. A2-A3). The order of the court of appeals granting the petitioners' motion to stay mandate was entered on August 24, 1978, staying its mandate until September 22, 1978 (App. A, p. A1). No application for an extension of time to file the petition has been made.

The jurisdiction of this Court is invoked pursuant to U. S. Code, Title 28, § 1254(1).

QUESTIONS PRESENTED

1. Did the district court have jurisdiction to hear a case involving the question of a denial of due process in connection with the termination for cause of a hospital provider agreement under Title XVIII of the Social Security Act (Medicare)?

2. Does the Due Process Clause require a hearing prior to publication by the Secretary of notice of termination for cause of a hospital provider from the Medicare program and prior to the Secretary effecting such termination?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. The Fifth Amendment of the Constitution provides in pertinent part:

> No person shall be . . . deprived of . . . property, without due process of law . . . .

2. U. S. Code, Title 28, §§ 1331 and 1361, are set forth in pertinent part in App. C, p. A19.

3. Sections 405(g) and (h), of the Social Security Act, 49 Stat. 624, as amended 42 U. S. C. 205, and 42 U. S. C. 1395, and the regulations of the Department of Health, Education and Welfare, are set forth in pertinent part in App. C, pp. A19-A21.

The petitioners have requested the clerk of the court of appeals to certify and transmit the record on appeal.

STATEMENT OF THE CASE

This is an appeal from a reversal by the court of appeals of the district court's preliminary injunctions preventing the Secretary of Health, Education and Welfare (HEW), from publishing notice of termination for cause of two community hospital's provider agreements under Medicare, and from effecting such termination for cause, without affording to the hospitals a pre-termination hearing. This Court has decided cases involving termination of benefits to beneficiaries under several titles of the Social Security Act. The instant cases, however, involve termination for cause of the long term contractual agreement between HEW and hospitals which are providing services to social security beneficiaries, and as such, are cases of first impression for the Court.

A. Cole Hospital

Cole Hospital is a 69 bed medical surgical hospital which has been providing health care services to the citizens of Champaign, Illinois since 1947. It has been a provider of health care services under Medicare since 1966 and currently, approximately 60 percent of its revenues come from Medicare reimbursements. On October 5, 1975, the hospital received a notice from HEW of the Secretary's determination to terminate the hospital's provider agreement on November 1, 1975, and to publish notice in the Champaign News-Gazette of the termination no later than

October 15, 1975. Representatives of the hospital met on October 10, 1975 in Baltimore, Md. with a Deputy Director of the Bureau of Health Insurance in a vain attempt to present reasons why the hospital's provider agreement should not be terminated. Having been denied the opportunity to present such reasons, the hospital sought injunctive relief from the U. S. District Court for the Eastern District of Illinois. The district court granted a temporary restraining order on October 15, 1975 (App. B, p. A16) and a preliminary injunction on November 5, 1975 (App. B, pp. A12-A14). The Secretary appealed the preliminary injunction to the U. S. Court of Appeals for the Seventh Circuit.

Concurrently with seeking injunctive relief, the hospital pursued the only administrative avenue open to it by requesting a post-termination hearing by HEW under 20 C. F. R. 405. 1501 (App. C, p. A21). HEW granted the hospital's request for a hearing and it was held in September through November of 1976. On July 12, 1977, the Administrative Law Judge issued a decision finding that the secretary had failed to prove many of its allegations against the hospital, but that on balance, the hospital failed to comply with the Conditions of Participation under Medicare, and its provider agreement should be terminated (CCH *Medicare and Medicaid Guide* ¶ 28,716, Jan. 20, 1978). The hospital requested review of this decision by the Appeals Council, HEW, which was granted. Oral argument before the Appeals Council is scheduled for November 1, 1978.

B. Jefferson Memorial Hospital Association

Jefferson Memorial Hospital Association is a 50 bed general community hospital which has been providing health care services to the residents of Mount Vernon, Illinois since 1947. It has been a Medicare provider since 1966, and receives approximately 65 per cent of its revenues from government reimbursements for health services rendered to Medicare beneficiaries. On Friday, January 16, 1976, the hospital received a notice from HEW of the Secretary's determination to terminate the hospital's

provider agreement as of February 8, 1976 and publish notice of such termination in the local newspapers on Tuesday, January 20, 1976. Without adequate time to formally request administrative relief prior to the proposed publication, the hospital turned to the U. S. District Court and obtained injunctive relief on Monday, January 19, 1976 (App. B, pp. A17-A18). The Secretary appealed the district court decision, and it was consolidated with the Secretary's appeal in Cole Hospital.

Concurrently with seeking injunctive relief, the hospital requested the Secretary to grant it a hearing to allow the hospital to present evidence as to why its provider agreement should not be terminated. That hearing was held in January and February, 1977 and on December 5, 1977 the administrative law judge found that the hospital substantially complied with the Medicare Conditions of Participation and that its provider agreement should not be terminated (CCH *Medicare and Medicaid Guide* ¶ 28,717, Jan. 20, 1978). The Secretary requested review of the decision by the Appeals Council, HEW, and review has just recently been granted.

C. On July 13, 1978, the court of appeals found that the district court lacked jurisdiction of the case under 28 U. S. C. § 1331, and under the Administrative Procedure Act, 5 U. S. C. 701. The court also found that the hospitals failed to show in their complaints that they had filed a "claim for benefits" as required by this Court in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). The hospitals filed a petition for rehearing, alleging (a) that the district court had jurisdiction under 28 U. S. C. § 1331, (b) that no "claim for benefits" was available or necessary in a provider termination for cause, and (c) that jurisdiction would also lie under 28 U. S. C. § 1361. The court of appeals denied the petition on August 11, 1978 (App. A, pp. A2-A3).

Subsequent to the July 13 order, and prior to the filing of the Petition for Rehearing, the Secretary notified both hospitals that since the court of appeals had lifted the injunction against termination, he was initiating reinspection of the hospitals and termination of their provider agreements, again, with no oppor-

tunity for the hospitals to rebut the Secretary's allegations of deficiency. The Secretary took this action despite the favorable administrative decision with regard to Jefferson, and despite the pending administrative appeal with respect to Cole. Faced with continued HEW attempts to terminate their provider agreements despite drastic changes in factual conditions at the hospitals over the three years since HEW's original decisions (App. D, pp. A22-A28), the hospitals moved for stay of mandate, which was granted until September 22, 1978 (App. A, p. A1).

D. The hospitals original complaints alleged jurisdiction under 28 U. S. C. § 1331 and the Administrative Procedure Act, 5 U. S. C. § 701. The district court made no specific finding as to jurisdiction in its orders (App. B). The court of appeals additionally considered jurisdiction under 42 U. S. C. § 405(g) and (h). In their petition for rehearing, the hospitals pointed out that jurisdiction could also lie under 28 U. S. C. § 1361. The court of appeals refused to find jurisdiction under any of these provisions.[1]

The Secretary is purporting to terminate for cause long term contracts with two hospital providers. His action to terminate threatens to bankrupt the hospitals. The Secretary is further purporting to publish notice of alleged grounds for the termination to the hospitals' communities. Publication will irreparably harm the hospitals' reputations in their community, as alleged in the Complaints, by causing a loss of public and employee

1. Under the Federal Rules of Civil Procedure and the general principles of modern jurisprudence, the hospitals are not required to name any jurisdictional basis whatever, and are entitled to relief under any statute relevant to the issue set out in the Complaint. *Wilwording* v. *Swenson*, 404 U. S. 249 (1971), *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1973). See *e.g.*, *Brown* v. *Allen*, 344 U. S. 443, 459 (" 'In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason,' "). Consequently, the court of appeals could have found jurisdiction under either § 405(g) or 28 U. S. C. § 1331 or under 28 U. S. C. § 1361 on the basis of the decision of the Ninth Circuit in *Elliott* v. *Weinberger*, 564 F. 2d 1219 (1977) and the Third Circuit in *Mattern* v. *Mathews*, ... F. 2d ..... (1978).

confidence in the hospitals' ability to deliver medical care. The result of the Secretary's terminations will culminate in financial bankruptcy to the hospitals, and loss of health care services to the communities. Rights under a long term contract and reputation are both interests which are protected under the Fifth Amendment to the U. S. Constitution from being taken away without due process of law. (See *Memphis Light, Gas & Water Div.* v. *Craft*, ... U. S. ....., 56 L. Ed. 2d 30 (1978). The hospitals' only realistic remedy to prevent an unconstitutional taking was to turn to the Federal courts. The court of appeals should have found that the district court had jurisdiction to grant the injunctions below.

ARGUMENT

I. Reasons for Granting Petition for Certiorari

The pivotal issue at this stage in the proceedings is whether the district court in the instant cases had jurisdiction to entertain the hospitals' claims for injunctive relief in light of the Supreme Court's decisions in *Weinberger* v. *Salfi*, 422 U. S. 749 (1975) and *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). A substantial question, appropriate for review by this Court, is presented because the decision of the court of appeals conflicts with the decision of the courts of appeals for the Third and Ninth Circuits in *Elliott* v. *Weinberger*, 564 F. 2d 1219 (9th Cir., 1977), Pet. for Cert. filed 4/21/78, 47 L. W. 3060, and *Mattern* v. *Mathews*, ... F. 2d ..... (3rd Cir., June 30, 1978). In addition, numerous courts, including the court of appeals have found adequate bases of jurisdiction to raise due process claims in similar and virtually identical circumstances. See, *Schwartzberg* v. *Califano*, ... F. Supp. ..... (D. C. S. C. N. Y., June 7, 1978); *North Penn Convalescent Residence, Inc.* v. *Califano*, ... F. Supp. ..... (D. C. E. D. Pa., July 5, 1978); *Hathaway* v. *Mathews*, 546 F. 2d 277 (7th Cir., 1976); *Auxier* v. *Woodward State Hospital School*, 266 N. W.

2d 139 (Iowa S. Ct., 1978); and, *Klein* v. *Matthews*, 430 F. Supp. 1005 (D. C. D. N. J., 1977).

The decision of the Secretary herein sought to be reviewed is his outright refusal to grant to the hospitals a pretermination hearing as is required by the Fifth Amendment to the United States Constitution. This refusal at a critical stage in the proceeding threatens to deprive the hospitals of a protected property right without adequate due process of law. The magnitude of the issue of the proper procedure to be followed by the Secretary in terminating for cause a hospital's provider agreement under Medicare calls for review and a decision by this Court of an important question of Federal law.

II. The District Court Had Jurisdiction to Hear a Case Involving a Question of Denial of Due Process in Connection with the Termination for Cause of a Hospital Medicare Provider Agreement.

A. The District Court Had Jurisdiction of These Cases Under 28 U. S. C. § 1331.

The court of appeals erred in holding that the decision of this court in *Weinberger* v. *Salfi, supra,* precludes judicial review under 28 U. S. C. § 1331 of the constitutional issues raised by the hospitals in this case. In *Salfi* this Court held that Congress, by enacting 42 U. S. C. 405(g), precluded Federal court review of prospective "claims" arising under the Social Security Act. The Court, however, distinguished a "claim" such as the claim for widow's benefits presented by Mrs. Salfi, from contractual obligations which enjoy protection under the Fifth Amendment to the U. S. Constitution:

> "a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status, *Dandridge* v. *Williams* . . . ." (p. 772.)

In *Salfi,* the "claim" was based upon a non-obligatory grant by Congress of financial assistance to widows (42 U. S. C. § 402). There was no contractual basis for Mrs. Salfi's claim. Consequently, the Count found that even if Mrs. Salfi raised a colorable issue of constitutional protection, that issue arose out of benefits granted by the Social Security Act and as a prospective claim for entitlements was best reviewed under the procedures set out in the Act (422 U. S. at 760-761).

Cole and Jefferson are not recipients of financial benefits doled out by Congress under the Act. They are parties to long-term contracts with the Federal government to provide health care services. That such a contract is a protected property right, has been determined by the courts. (See *Case* v. *Weinberger,* 523 F. 2d 602, 606 (2d Cir. 1975); *Hathaway* v. *Mathews, supra; Board of Regents* v. *Roth,* 408 U. S. 564, 577 (1972); *Lucas* v. *Chapman,* 430 F. 2d 945 (5th Cir. 1970)) and has been conceded by the Secretary in his Reply Brief (p. 17, n. 10). Such a property right may not be terminated, especially "for cause", without due process of law (*Memphis, Light, Gas & Water Div.* v. *Craft, supra*).

It is also well recognized that reputation is a protected right under the Fifth Amendment. *Board of Regents* v. *Roth, supra.* That the hospitals are entitled to protection of their reputations cannot be disputed. The publication by the Secretary of notice of alleged deficiencies prior to termination (and prior to a hearing to determine the truth of the allegations) will cause irreparable harm to the reputation of the hospitals. As is demonstrated by the decisions of the Administrative Law Judges, the allegations with respect to Jefferson Hospital were found to be untrue, and two of the three allegations with respect to Cole Hospital were abandoned by the Secretary. Without intervention by the district court the Secretary would have published those allegations to the community, thereby irreparably and falsely injuring the hospitals' reputation.

Unlike *Salfi,* the constitutional claim to protection of their contract rights and their reputations raised by the hospitals are not "claims for benefits" arising under the Social Security Act.

They arise separate and apart from the Act and out of the hospitals' status as contractors and out of their position in their communities as health care providers. The Court of Appeals for the Ninth Circuit clearly enunciated this distinction in *Elliott* v. *Weinberger, supra. Elliott* involved an action under 28 U. S. C. § 1361 to compel the Secretary to provide hearings to individual petitioners prior to taking action to recoup overpayments of social security benefits. The court found that jurisdiction existed in the district court under 28 U. S. C. § 1361:[2]

> "Thus the trial courts properly found jurisdiction. Here we are concerned with the *duty* of the Secretary to provide certain minimum due process notice and hearing opportunities to Social Security recipients subject to recoupment. *Frost* v. *Weinberger,* 515 F2d 57, 62 (2d Cir. 1975), *cert. denied,* 424 U.S. 958, 96 S. Ct. 1435, 47 L. Ed. 2d 364 (1976); *Martinez* v. *Richardson,* 472 F.2d 1121, 1125-26 & n. 12 (10th Cer. 1973). It is a strict fifth amendment issue and the question of discretion does not arise. The Secretary has either met his constitutional duty to provide a certain minimum or he has not. He has no discretion to provide less than that constitutionally required. (p. 1226.)
>
> "Nor are the present suits precluded by 42 U.S.C. § 405(h) which controls judicial actions to recover benefits. *Weinberger* v. *Salfi,* 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed. 2d 522 (1975) interprets § 405(h) to require that claims for benefits be asserted only through 42 U.S.C. § 405(g). The instant suits are quite different. They assert a constitutional right to due process notice and hearing when alleged overpayments are recouped. They are not claims for benefits. Nor would granting the relief sought result in an entitlement to benefits. The distinction between due process questions divorced from a claim for benefits and questions related to the merits of a benefits claim is a significant one, requiring considerably different treatment by the courts. *See Eldridge, supra,* 424 U.S. at 329-332, 96 S.Ct. 893." (564 F. 2d at 1226.)

2. The Court can find jurisdiction of the cases under the Mandamus statute (28 U. S. C. § 1361) without requiring the plaintiff hospitals to so allege jurisdiction in their complaints. This action may be construed as a suit seeking to compel the Secretary to offer a pre-termination hearing to the Hospitals.

The Secretary's refusal to provide a pre-termination hearing to Appellees before taking action which would terminate their long term contracts with the government, and which would permanently and irreparably injure the hospitals' reputation by publication of untrue or unsupported alleged deficiencies is a violation of due process derived not from any statute, but from common-law principles embodied in the constitutional guaranty of due process of law (*Auxier* v. *Woodward State Hospital School,* 266 N. W. 2d 139 Iowa Ct. 1978). Clearly, an attempt by Congress to deny the courts the ability to consider claims arising under the Constitution is not to be brooked unless adequate alternatives are available. While it may be argued that the procedure set forth in 28 U. S. C. § 405(h) is adequate to provide review of constitutional issues, first at the administrative level and then in the courts, we urge otherwise as did the court in *Elliott* v. *Weinberger, supra:*

> "Unlike benefits cases wherein the purpose of the administrative process is served by requiring all actions to proceed through administrative review before appeal to the courts, questions of due process benefit little from administrative exhaustion. There is a need for prompt resolution of such questions, *Eldridge, supra,* 424 U.S. at 330, 96 S.Ct. 893, and they are typically beyond the competence of the Secretary to decide. On the contrary, the development and fine-tuning of notions of due process is peculiarly the province of the courts.
>
> Thus, while the language of § 405(h) precludes "judicial action to recover on any *claim* arising under this subsection," [emphasis added] it simply does not address the question of due process. Unless the question sought to be litigated is within the express language of the limiting statute, there is no basis for concluding that Congress sought to limit or preclude judicial review. *Salfi, supra,* 422 U.S. at 761-762, 95 S.Ct. 2457. (564 F.2d at 1227.)"

The hospitals action seeking protection of *existing* property rights is not controlled by this Court's decisions in *Salfi* and *Eldridge* where plaintiffs sought review of decisions to deny

prospective, non-contractual benefits. The district court, therefore, had jurisdiction to consider the hospitals' constitutional claims and to grant the injunctions in this case to prevent irreparable harm[3] to the hospital's financial viability and to their reputation.

B. The District Court Had Jurisdiction of These Cases Under 42 U. S. C. § 405(g).

The court of appeals' order of July 13, 1978 recognized that the district court had jurisdiction of these cases under 42 U. S. C. 405(g) subject to the conditions for Federal court review set out in *Mathews* v. *Eldridge*, *supra*. *Eldridge* holds

3. The court of appeals July 13 order (App. A, pp. A4-A11) implies that the danger of irreparable harm to these hospitals may have passed. This is not so. In the case of Jefferson, an Administrative Law Judge found that the hospital's building complies substantially with the Medicare Conditions of Participation, and that its provider agreement should be continued until December 5, 1978. Under the Secretary's regulations, however, such a decision does not necessarily prevent a termination of the provider agreement retroactive to February 6, 1976, and recoupment from Jefferson of all payments under Medicare for medical services rendered since that date. The Secretary has requested review of the ALJ decision by the Appeals Council, HEW, and review has recently been granted. With respect to Cole, the hospital requested review of the adverse ALJ decision and review has been granted by the Appeals Council. One of the issues before the Appeals Council is whether or not the ALJ improperly refused to consider Cole's plan of correction of physical deficiencies and its actions to implement said plan. Since the Secretary's October 3, 1975, notice to the hospital, an automatic sprinkler system has been installed covering the entire facility, additional exits have been added to the second and third floors of the building, and additional interior work has been done. Furthermore, after specific consideration of these actions, the Illinois Hospital Licensing Board, at its April 12, 1978, meeting, voted to permit Cole to continue to use its existing facility as a hospital until its new facility is constructed. The hospital's replacement facility is under construction with anticipated occupancy of April 15, 1979. Any action by the Secretary to terminate Cole's provider agreement based on alleged physical conditions existing in 1975 would be grossly unfair, particularly if coupled with an attempt to recoup payments made to the hospital since November 1, 1975. Evidence of the hospital's corrective action is of record before the Appeals Council, HEW (See Affidavit, App. D, pp. A22-A23).

that the elements of (1) exhaustion of administrative remedies and (2) statement of a "claim" must be satisfied before the courts can review decisions of the Secretary. The hospitals have amply argued in the courts below and at pages 21-22, *infra*, the reasons for considering the Secretary's "initial" decisions to terminate their provider agreements as final decisions for purposes of review, and will not repeat those arguments here. As to the requirement of presenting a "claim for benefits" to the Secretary, the hospitals contend that such a requirement is not applicable to provider termination proceedings, or in the alternative, if it is applicable, a "claim" has been presented.

1. *Salfi does not require a "claim for benefits" to be presented to the Secretary prior to seeking Federal court review in a provider termination case.*

Salfi and *Eldridge* both dealt with issues of prospective entitlement to benefits provided to individuals under Title II of the Social Security Act (42 U. S. C. §§ 402 and 423). A cursory review of the Act reveals a statutory scheme to provide specific payments to qualified recipients. These payments, generally termed "benefits," are akin to welfare payments in that they respond to a presumed financial need of the recipient (see *Goldberg* v. *Kelly*, 397 U. S. 254 (1970)). For each type of benefit the Secretary has developed a printed application, or "claim" form, to be used by individuals to apply for benefits. This Court in *Eldridge* relied on *Salfi* in requiring a "claim for benefits" to be presented to the Secretary prior to court review. In *Salfi* the Court required only the presentation of an "application" for payment to the Secretary for the purpose of stating a claim upon which the Secretary could render a decision:

> "As to class members, however, the complaint is deficient in that it contains no allegations that they have even *filed an application* with the Secretary, *much less that he has rendered any decision*, final or otherwise, review of which is sought. The class thus cannot satisfy the requirements for jurisdiction under 42 USC § 405(g)" (422 U. S. at 764). (Emphasis added.)

Thus, the Court merely required any potential recipient to make known to the Secretary that he was claiming payment under the Act and to present an issue upon which the Secretary could render a decision. In the case of a provider termination a "claim for benefit" in the sense of welfare payments simply does not exist.

In 1966, both hospitals filed applications with the Secretary to enter into provider contracts. Their contracts are long-term and continuing. There is no "claim" form for the hospitals to file, to continue as providers. In addition, the time available between notification to a hospital of the Secretary's decision to terminate for cause, and publication of the alleged ground for termination is completely insufficient and, in actual practice, all too brief for any type of formal claim to be presented. It is the Secretary, through his regulations, who has determined the timing of notice to the hospital and of publication of alleged deficiencies. To allow the Secretary's timing to control the ability to file a "claim" and then to insist upon such a filing as an absolute prerequisite to court review would lead to a mischievous result which cannot have been intended by this Court.

2. *In the alternative, the hospitals presented "Claims for Benefits" to the Secretary prior to seeking court relief.*

As discussed above, the requirement for a "claim for benefits" as enunciated in *Salfi*, merely requires these hospitals to have made their claims known to the Secretary so that he may act upon them. In an involuntary termination for cause under 42 U. S. C. 1395cc, the Secretary is taking affirmative action to terminate the hospitals' provider agreements without their consent. To the extent that the Secretary has any authority to act in such situations it must be presumed that a claim has been presented on which he can act. Therefore, in this connection the Secretary must be presumed to be aware of the hospitals' continuing status as providers in the Medicare program and this status in itself must form the basis of the claim on

which the Secretary acts. Further, an examination of the record discloses that the hospitals specifically notified the Secretary of their claim (1) to remain in the program, and (2) to a pre-termination hearing.

In the case of Cole, representatives of the hospital, including counsel, travelled to Baltimore, Maryland, to meet with a Deputy Director of the Bureau of Health Insurance. The nature of the meeting can be variously characterized, but its essence was to object to the perfunctory termination of the hospital's provider agreement. The Secretary cannot assert that he was unaware of Cole's claim to remain in the Medicare program because Cole's provider contract would have continued uninterrupted but for the Secretary's action to terminate it. Secondly, the Secretary and the Attorney General were personally served in Washington, D. C. with copies of the hospital's Complaint on October 15, 1975, prior to the hospital's hearing on its request for a temporary restraining order. The Secretary was represented at the hearing by the U. S. District Attorney, and had the opportunity through counsel to grant Cole's request before issuance of the preliminary injunction.

With respect to Jefferson, the notice of termination was hand delivered to the hospital on Friday, January 16, 1976, the same date that it was signed in Chicago. Public notice was to be published on Tuesday, January 20, 1976. The hospital had only one business day before scheduled publication to personally meet with representatives of the Secretary. That amount of time was insufficient. Jefferson did, however, personally serve the Secretary and the Attorney General in Washington, D. C. with copies of its Complaint prior to seeking court relief. The Secretary was represented by the U. S. District Attorney at the hearing on the Temporary Restraining Order, and, as with Cole, took the position that the hospital was unequivocally not entitled to a pre-termination hearing.

The Secretary was fully aware of both hospitals' continuing contractual status as providers in the Medicare program. That

contractual status was the hospitals' "claim" as required in *Eldridge* and *Salfi*. The Secretary, in acting to terminate for cause the hospitals' contractual status as providers, was, in fact, rendering a decision on the hospitals' "claims". No further action need be required of the hospitals prior to seeking court review of the Secretary's decision.

C. The District Court Had Jurisdiction of These Cases Under 28 U. S. C. § 1361.

Section 1361 grants original jurisdiction to the district courts to compel an officer of the United States to perform a duty owed to the plaintiff (App. C, p. A19). The hospitals' provider agreements are protected property interests under the Constitution (See p. 9, *supra*). The Secretary is authorized to terminate a provider agreement "only after the Secretary has determined (A) that such provider of services is not complying substantially with the . . . regulations" 42 U. S. C. § 1395cc(b). That is, the Secretary may only terminate a provider agreement "for cause".

In discussing the quantum of due process to be afforded by a public utility, this Court recently held: "Because [the power company] may terminate service only 'for cause' respondents assert a 'legitimate claim of entitlement' within the protection of the Due Process Clause [citing *Arnett* v. *Kennedy*, 416 U. S. 134 (1974); *Bishop* v. *Wood*, 426 U. S. 341 (1976)]. *Memphis Light, Gas & Water Div.* v. *Craft, supra*, p. 40.

The Secretary's procedure of publishing notice of termination, and then offering only a post-termination hearing to a hospital provider is constitutionally deficient. The Secretary has a duty to provide to the hospitals a pre-termination hearing procedure that affords due process of law. The district courts have jurisdiction under § 1361 to compel the Secretary to perform his duty towards the hospitals and to grant a hearing prior to publication of notice and termination. *Elliott* v. *Weinberger, supra; White* v. *Mathews*, 559 F. 2d 852, 855-856 (2d Cir. 1977),

cert denied, 46 U. S. L. W. 3680 (U. S. Feb. 22, 1978); *Caswell* v. *Califano*, 435 F. Supp. 127, 131-33 (D. Me. 1977). See also Byse & Fiocca, "Section 1361 of the Mandamus and Venue Act of 1962 and 'Nonstatutory' Judicial Review of Federal Administrative Action" 81 *Harvard L. R.* 308 (1967).

Section 405(h) does not preclude jurisdiction of these cases under § 1361. Section 405(h) controls actions brought to recover benefits under the Social Security Act. Payment to a hospital provider for services actually rendered are not benefits under the Act. Likewise hospitals are not beneficiaries under the Act, but rather they provide services to the eligible individuals who are beneficiaries under the Act. Further, a suit seeking due process under the Constitution does not arise under the Act and must be treated differently by the courts from a "claim for benefits." "Thus, while the language of § 405(h) precludes 'judicial action to recover on any *claim* arising under this subsection,' [emphasis added] it simply does not address the question of due process." *Elliott* v. *Weinberger, supra* at 1227.

The district court had jurisdiction under § 1361 to hear the hospitals claims of deprivation of due process, and the court of appeals erred in failing to recognize such jurisdiction.

III. The Due Process Clause Requires a Hearing Prior to Publication by the Secretary of Notice of Termination for Cause of a Hospital's Medicare Provider Agreement and Prior to the Secretary Effecting Such Termination.

A. Due Process Requires a Pre-Termination Hearing in These Cases.

The Secretary's actions to terminate for cause the Medicare provider agreements of these hospitals without affording them a pretermination hearing amounts to an unconstitutional deprivation of property without due process of law.

Both hospitals have been providers of Medicare services under contract with the Secretary since 1966. This Court has deter-

mined that "long term (government) contracts for defense, space, and education . . ." are property interests protected by the due process clause of the Fifth Amendment to the U. S. Constitution (*Goldberg* v. *Kelly, supra,* at p. 262). *Memphis Light, Gas & Water Division* v. *Craft, supra.* There is no difference between those types of contracts and the provider agreements between the hospitals and the Secretary involved in this case. The courts have further held that long service under an annually renewable contract between the Secretary and a nursing home creates an expectation of continued renewal which expectation is a constitutionally protected interest (*Hathaway* v. *Mathews, supra; Case* v. *Weinberger, supra*), and that reputation and integrity are likewise protected property interests of which the government may not deprive an individual without notice and an opportunity to be heard (*Board of Regents* v. *Roth, Supra,* at p. 573).

Here, the Secretary seeks to terminate for cause these hospitals' provider agreements by letter with published notice thereof to the community two weeks before the effective termination date in accordance with his regulations set out at 20 C. F. R. 405.1501 *et. seq.* Indeed, if the statute and regulations allow the Secretary to terminate the hospitals' provider agreements for cause and publish notice thereof without giving the hospitals the right—fundamental to due process—to an impartial evidentiary hearing on the facts and law pertinent to the termination, then the law and regulations would be clearly unconstitutional.

In *Goldberg* v. *Kelly, supra,* this Court held that the Commissioner of Social Services of New York City could not terminate welfare payments upon providing simply notice and a seven-day period to file a written request for further review. Due process demanded a pre-termination evidentiary hearing. Appreciating that government officials must sometimes take summary action pending a later hearing, the *Goldberg* court sought to delineate the area where due process restricted the government's interest in making unilateral determinations. The extent

to which procedural due process must be afforded was found to turn upon two factors: the "grievous loss" which might be suffered by the individual, and a balancing of interests to determine whether an individual's interest in avoiding this loss outweighs the government's interest in summary adjudication.

In the instant cases, both the District Court and the Administrative Law Judges found that the hospitals would incur "grievous losses", *i.e.,* bankruptcy, by the Secretary's termination of Medicare reimbursements. This Court's reasoning in *Goldberg,* at 397 U. S. 264, is therefore especially appropriate:

> "Thus the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility *may deprive an eligible recipient of the very means by which to live while he waits.* Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." (Emphasis added.)

The passage aptly describes the hospitals' predicament in that their very existence would be jeopardized "while they wait" for a lengthy post-termination appeals process. Moreover, the *Goldberg* plaintiffs were held to be entitled to a pre-termination hearing even though they could have obtained a full restoration of wrongfully withheld payments upon a successful appeal. Here the Medicare Act contains no provision granting the hospitals such restoration after appeal. The hospitals' plight in the present case is patently worse than that of the *Goldberg* plaintiffs.

A number of post-*Goldberg* cases have extended procedural due process protection in social security cases. *Elliott* v. *Weinberger, supra; Hathaway* v. *Mathews, supra; Mattern* v. *Mathews, supra.* There is no less a need for a pretermination hearing with respect to these two hospitals. Their very existence depends upon reimbursements paid by the Secretary under their provider agreements. Termination for cause of these agreements without a prior hearing is contrary to due process. This deprivation of

due process by the Secretary constitutes an important question of Federal Law which this court should review.

B. The Social Security Act Requires a Pre-termination Hearing by the Secretary Prior to His Publication of Notice of Termination.

Section 1866 (42 U. S. C. § 1395cc) provides that a provider agreement with the Secretary may be terminated

> "by the Secretary at such time and upon such reasonable notice to the provider of services and the public as may be specified in regulations, *but only after* the Secretary has determined . . . that such provider of services is not complying substantially . . . with the provisions of this subchapter and regulations thereunder. . . . (Emphasis added.)

The intent of Congress that a pre-termination public hearing be had under § 1866 is clearly reflected in the Senate and House Committee Reports on the Social Security Act of 1965, which state:

> "The Secretary could terminate an agreement only after reasonable notice and only if the provider (a) does not comply with the provisions of the agreement or of the law and regulations . . . *The Secretary would be required to give reasonable notice and opportunity for hearing to a provider of services . . . before terminating an agreement with the provider.* The final administrative decision is subject to judicial review." (emphasis added) (1 U. S. Congressional and Administrative News 1965 page 1943, 1991.)

It is an axiom of statutory construction that Congress is presumed not to have enacted an unconstitutional statute (*U. S.* v. *Carolene Products Co.*, 304 U. S. 144 (1938)). This Court must, therefore, look to the legislative history of the statute to determine if the controlling intent of Congress was to give providers the right to a hearing prior to termination of their provider agreements (*U. S.* v. *Cooper Corp.*, 312 U. S. 600 (1941)). The legislative history clearly demonstrates such Congressional intent and that intent must control (*Jones* v. *N. Y. Guaranty & Indem. Co.*, 101 U. S. 622 (1879)). Since the

statute, when read together with the legislative history, requires a pre-termination hearing, the Secretary must grant a hearing for his authority cannot exceed or contravene the grant of law (*FTC* v. *Raladam Co.*, 283 U. S. 643 (1930)); *Greely* v. *Thompson, et al.*, 10 Howard 225 (U. S. 1850).

The requirement of a pre-termination hearing is set out in the legislative history of the Social Security Act, but the Secretary has chosen to ignore the mandate of Congress and to proceed to terminate for cause the provider agreements of these two hospitals without granting an evidentiary hearing allowing the hospitals to present evidence to determine whether termination of the agreements is proper. Instead his regulations only provide for a post-termination hearing (20 C. F. R. 405.1501 *et. seq.*), which does not defer the termination of the provider agreement, and which does not restore to the hospital reimbursements denied between the termination and the hearing.

The Secretary contended below that his refusal to grant an evidentiary hearing is not a "final" agency action for purposes of the Social Security Act. His contention does not preclude judicial review. While HEW's proposed publication of notice and termination of the hospitals' provider agreements may not be "final" agency action for purposes of the Social Security Act, the finality requirement is interpreted by the courts in a pragmatic way to determine whether a matter is ripe for judicial review. *Isbrandtsen Co.* v. *U. S.*, 211 F. 2d 51, 55 (D. C. Cir. 1954), *cert. den. sub nom. Japan-Atlantic & Gulf Conf.* v. *U. S.*, 347 U. S. 990 (1954). Exhaustion of administrative remedies is not required where agency action threatens a party with extreme hardship or irreparable harm. *Abbot Laboratories* v. *Gardner*, 387 U. S. 136, 149 (1967); 3 Davis Administrative Law Treatise Sec. 20.01. This Court in *Mathews* v. *Eldridge*, *supra*, explained its conclusion that the Secretary's denial of Eldridge's claim was final:

> Eldridge's constitutional challenge is entirely collateral to his substantive claim of entitlement. Moreover, there is a

crucial distinction between the nature of the constitutional claim asserted here and that raised in *Salfi*. A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a post-deprivation hearing. See *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 156 (1974). In light of the Court's prior decisions, see *e.g., Goldberg* v. *Kelly, supra; Fuentes* v. *Shevin, supra*, Eldridge has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments. Thus, unlike the situation in *Salfi*, denying Eldridge's substantive claim "for other reasons" or upholding it "under other provisions" at the post-termination stage, 422 U. S., at 762, would not answer his constitutional challenge.

The district court and the Administrative Law Judges found that each hospital was faced with irreparable harm and with financial bankruptcy which would permanently deny medical services to the citizens of its service area. A post-termination would not repair the damage to the hospitals caused by publication of alleged grounds for termination. Moreover, the Secretary's regulations do not provide for retroactive payments to a provider if the termination is found to be erroneous. In a practical sense, the Secretary's decision to terminate the hospitals' provider agreements is final, and is ripe for judicial review.

CONCLUSION

This Petition for Certiorari should be granted.

Respectfully submitted,

RONALD SCOTT MANGUM
LISS & MANGUM
208 South LaSalle Street
Chicago, Illinois 60604
Attorney for Petitioners

September 21, 1978.

APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 24, 1978.

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*

COLE HOSPITAL, INC., a Delaware corporation, and JEFFERSON MEMORIAL HOSPITAL ASSOCIATION, an Illinois Not-for-Profit organization, *Plaintiffs-Appellees,*	Appeal from the United States District Court for the Eastern District of Illinois, Danville Division.
Nos. 76-1134, 76-1135	Nos. 75-2-119 CV 76-2-006 CV
vs.	
JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare, *Defendant-Appellant.*	Henry S. Wise, Judge.

This matter comes before the court on the "Hospitals' Motion to Stay Mandate" and affidavit in support thereof filed herein on August 18, 1978, by counsel for the plaintiffs-appellees. On consideration whereof, the court being fully advised in the premises;

IT IS ORDERED that the mandate of this court issued on August 21, 1978, be, and the same is hereby, Recalled, and the "Hospitals' Motion to Stay Mandate" be, and the same is hereby Granted up to and including September 22, 1978, pending the filing of a Petition for Writ of Certiorari to the United States Supreme Court pursuant to Federal Rule of Appellate Procedure 41(b).

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 11, 1978.

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*

COLE HOSPITAL, INC.,
Plaintiff-Appellee,

No. 76-1134 *vs.*

SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Defendant-Appellant,

and

JEFFERSON MEMORIAL HOSPITAL ASSOCIATION,
Plaintiff-Appellee,

No. 76-1135 *vs.*

JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare,
Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Illinois, Danville Division.

Nos. 75-2-119 CV & 76-2-006 CV

Henry S. Wise, Judge.

ORDER

On consideration of the petition for rehearing *in banc* filed by counsel for plaintiff-appellees on July 26, 1978,

Treating the petition as a petition for rehearing under Rule 40, F.R.A.P., the members of the original panel having voted to DENY, or

Treating the petition as a suggestion for rehearing *in banc* under Rule 35, F.R.A.P., no judge in regular active service having requested a vote thereon, accordingly

IT IS ORDERED that the petition for rehearing *in banc* is hereby Denied.

Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
July 13, 1978.

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*

COLE HOSPITAL, INC., a Delaware corporation,
Plaintiff-Appellee,

No. 76-1134 *vs.*

SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Defendant-Appellant,

and

JEFFERSON MEMORIAL HOSPITAL ASSOCIATION,
Plaintiff-Appellee,

No. 76-1135 *vs.*

JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Illinois, Danville Division.

Nos. 75-2-119 CV & 76-2-006 CV

Henry S. Wise, Judge.

These causes came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, Danville Division, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the orders of the said District Court in these causes appealed from be, and the same are hereby, Vacated, with costs, and the causes Remanded with instructions, in accordance with the order of this court entered this date.

Unpublished order not to be cited per circuit Rule 35.

Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued April 29, 1976)

July 12, 1978.

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*

COLE HOSPITAL, INC.,
Plaintiff-Appellee,

No. 76-1134 *vs.*

SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Defendant-Appellant,

and

JEFFERSON MEMORIAL HOSPITAL ASSOCIATION,
Plaintiff-Appellee,

No. 76-1135 *vs.*

JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare,
Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Illinois, Danville Division.

Nos. 75-2-119 CV & 76-2-006 CV

Henry S. Wise, Judge.

ORDER

The Secretary of Health, Education and Welfare (HEW) appealed from preliminary injunctions[1] enjoining HEW from

1. In the action brought by Jefferson, the order took the form of a temporary restraining order. It extended beyond the time limits permitted by Rule 65(b), F. R. Civ. P., and is therefore treated as a preliminary injunction.

terminating the Medicare provider agreements with Cole Hospital and Jefferson Hospital. Plaintiffs commenced these actions contending that their status as "providers" of Medicare services had been unfairly terminated by HEW and that this action threatened their survival as community hospitals. The district court found in both cases that the termination would cause plaintiffs irreparable harm. HEW argues on appeal that the district court lacked jurisdiction of these actions and, in the alternative, that the terminations without pre-termination hearings were proper.

Title XVIII (Medicare) of the Social Security Act provides an insurance program for the "costs of hospital and related post-hospital services" for senior and disabled individuals who qualify for such benefits. 42 U. S. C. § 1395(c). This program anticipates that payment for such services will be made directly to the hospitals that provide them. 42 U. S. C. §§ 1354d, 1395g. A hospital is eligible for reimbursement by the Medicare program after it files an agreement with the Secretary evidencing its intention to comply with various provisions regarding the quality and cost of covered services. 42 U. S. C. § 1395cc. HEW may terminate this agreement, thereby discontinuing payment for services rendered to those eligible for Medicare benefits, if the provider (hospital) fails to abide by the terms of the agreement or Medicare statutes and accompanying regulations. 42 U. S. C. § 1395cc(6).

I.

Cole Hospital and Jefferson Memorial Hospital have been providers of services under the Medicare program since 1966. On October 3, 1975, HEW notified Cole that it was terminating its provider agreement because it no longer fulfilled the requirements for participation as a provider of services in the Medicare program. Cole had allegedly failed to meet the fire safety standards promulgated by HEW under the authority of § 1861(e) of the Act, 42 U. S. C. § 1395. These standards had been incorporated by regulation into the Medicare program and hospitals

had been required to meet them in order to maintain their status as providers under Medicare. 20 C. F. R. §§ 405.1020, 405.1022, 405.1028. There were listed numerous violations of these fire safety regulations and the maintenance of inadequate laboratory facilities. HEW further informed Cole that it would publish the notice of this termination in local newspapers. HEW also explained that Cole could request a hearing in which it could challenge the decision to terminate the agreement.

On January 16, 1976, HEW notified Jefferson Memorial Hospital that it was terminating Jefferson's Medicare provider agreement. HEW claimed that Jefferson failed to meet the fire safety standards required of providers in the Medicare program. 20 C. F. R. § 405.1022. The agreement was to be terminated on February 6 and a notice of this action was to appear in a local newspaper on January 20. Shortly after the receipt of the notice of termination, Jefferson commenced this action.

II.

Cole's complaint set forth two counts. Count I claimed jurisdiction under 28 U. S. C. § 1331, and alleged that termination without an opportunity for a prior hearing is a denial of due process. Acknowledging that this count sought an injunction against enforcement of an Act of Congress for repugnance to the Constitution, plaintiff requested that a three-judge court be convened. Count II claimed jurisdiction additionally under the Administrative Procedure Act, 5 U. S. C. §§ 702, 704. Although it did not allege that the deficiencies claimed by HEW did not physically exist, it claimed that because of a suspension of state regulations plaintiff's hospital conformed to state requirements and that federal regulations required no more.

Jefferson's complaint set forth three counts. Count I was similar to Cole's Count I, but did not request convening of a three-judge court. Count II claimed jurisdiction under the Administrative Procedure Act as well as § 1331. It alleged that the hospital is not in violation as claimed. Count III alleged that

termination without prior hearing violates the controlling statute, asserting jurisdiction as in Count II.

III.

In granting the preliminary injunctions, the court found that termination as providers would cause plaintiffs to cease operations and cause them irreparable harm. In Jefferson, the court said nothing about probable success, and in Cole, only that plaintiff had "created . . . an impression that it is likely to succeed in a trial on the merits." The court made no comment as to any theory of the cases on which it acted, and did not notify the chief judge of the circuit so that a three-judge court would be designated. Appellant HEW noted in its brief that the "matter [of the three-judge court] is not in issue on this appeal." The plaintiffs are silent on this point.

Although the individual district judge would have authority, in a case requiring a three-judge court, to grant a temporary restraining order pending determination by the full court, he did not have power in such a case to grant an interlocutory injunction, 28 U. S. C. § 2284 (U. S. C. 1975).

Accordingly, we treat the case in the posture of an attempt to review the administrative decisions in these cases, albeit one of the claims is a denial of due process.

IV.

HEW argues that the district court had no jurisdiction of these actions. We think that for the purpose of jurisdiction, a determination of HEW to terminate a provider agreement under Medicare is equivalent to a determination to terminate benefits, considered in *Weinberger* v. *Salfi*, 422 U. S. 749 (1975) and *Mathews* v. *Eldridge*, 424 U. S. 319 (1976).

42 U. S. C. § 1395ff(c) specifies that anyone dissatisfied with a determination of noncompliance by a provider shall be entitled to a hearing as provided in § 405(b) of the Act and to a judicial

review of the "final decision after such hearing" as is provided by § 405(g). Plaintiff claims as a matter of statutory interpretation or constitutional right that a hearing must precede any effective termination. HEW's position is that the provider agreement may properly be terminated (particularly where HEW is satisfied after investigation that a hospital is unsafe) without prior hearing, but subject to a hearing at the option of the provider, after termination.

As already noted, the only sources of jurisdiction alleged in the complaint were 28 U. S. C. § 1331 (federal question) and the Administrative Procedure Act. *Salfi* established that § 1331 does not confer jurisdiction of these actions. *Califano* v. *Sanders*, 430 U. S. 99, 107 (1977) held that the Administrative Procedure Act granted no jurisdiction.

Although the complaints did not allege jurisdiction under 42 U. S. C. § 405(g), we have considered whether there could be jurisdiction under that section on the theory of *Eldridge* that an agency decision without a hearing may be final as to a collateral claim of a constitutional right to a hearing before deprivation of a benefit. Plaintiffs' dependence here on their income as providers may put them, like *Eldridge*, in a position where "an erroneous termination would damage [them] in a way not recompensable through retroactive payments." 424 U. S. at 331.

In *Eldridge*, however, the Supreme Court held that it was essential to jurisdiction that a claim for continuation of benefits shall have been presented. The Court found such claim in answers made by Eldridge to a state agency and a letter of Eldridge responding to a tentative determination. It may well be that something amounting to an adequate claim for continuation of provider status was presented by plaintiffs here. The complaints do not reflect anything of that nature, and, as noted, § 405(g) was not pleaded as a source of jurisdiction. Supporting affidavits in the *Cole* case refer to a meeting on October 10, 1975 (after notice of termination, but before the effective date,

November 1) at which Cole requested that the termination be "suspended" until a state agency had time to act on a building permit. We do not view this request as a claim of entitlement under *Eldridge*.

Accordingly, based on the present record, the district court had no jurisdiction of the actions, and the injunctions appealed from must be vacated for that reason.

We note, additionally, two developments of which appellant has informed us during the overlong pendency of this appeal.

Administrative hearings have been held as to the termination of each plaintiff.

In *Cole*, the ALJ made numerous findings, deciding that the hospital has been in serious and "deplorable" violation of applicable construction and fire safety standards, and that when the injunction is no longer in effect, the Secretary should proceed instantly with termination. Cole has appealed within the agency. Although no final administrative decision has been reached, the findings themselves could arguably be the showing of emergency which this court indicated in a "Medicaid" case might justify a pre-hearing termination. *Hathaway* v. *Mathews*, 546 F. 2d 227, 232 (7th Cir. 1976).

In *Jefferson*, the ALJ decided favorably to Jefferson and recommended extension of the provider agreement for one year. The Secretary has taken an administrative appeal. Although there is no final administrative decision, the outcome at the ALJ level means there is no immediate threat of irreparable injury.

The orders appealed from are vacated and the causes remanded. Unless plaintiffs amend their complaints in a manner which shows jurisdiction, consistent with this order, the district court is directed to dismiss the actions for want of jurisdiction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois

COLE HOSPITAL, INC., a Delaware Corporation,
Plaintiff,

vs.

SECRETARY OF HEALTH, EDUCATION AND WELFARE, an Agency of the Federal Government,
Defendant.

No. 75-2-119

PRELIMINARY INJUNCTION

This matter coming before this Court on the Court's Order for Defendant to show cause why he should not be enjoined and restrained as prayed in Plaintiff's Complaint, and this Court having temporarily enjoined and restrained Defendant from terminating Plaintiff's Agreement to provide services under the Health Insurance for the Aged and Disabled Program (Medicare) established under Title XVIII of the Social Security Act, and from publishing notice of said termination in a newspaper of general circulation in Champaign-Urbana, Illinois, and the Defendants being represented by the United States Attorney for the Eastern District of Illinois, and Plaintiff being represented by John P. O'Rourke, Dukes, O'Rourke, Stewart & Martin, Ltd., of Danville, Illinois, and Ronald Scott Mangum, Lord, Bissell & Brook, of Chicago, Illinois. The Court having heard and considered the evidence, pleadings, affidavits and oral argument submitted and presented by the parties, Finds That:

1. Cole Hospital is a hospital of long standing medical service to the Champaign community and surrounding areas, and approximately 60% of Cole Hospital's patients are Medicare patients.

2. Plaintiff has not been afforded the opportunity for an evidentiary hearing before an impartial hearing officer appointed by Defendant prior to Defendant's termination of Plaintiff's provider agreement under Medicare.

3. The termination by Defendant of Plaintiff's agreement to provide services under the Health Insurance for the Aged and Disabled Program (Medicare) established under Title XVIII of the Social Security Act, 42 U. S. C. §§ 1395 *et seq.*, and the publication of notice of that termination in a newspaper of general circulation in Champaign-Urbana, Illinois, more particularly the Champaign News Gazette, will cause Plaintiff to cease operating as a hospital and will cause Plaintiff irreparable harm unless restrained and enjoined by this Court.

4. The restraint and enjoining of said termination and publication by Defendant will cause Defendant little, if any, harm.

5. Plaintiff has created with the Court an impression that it is likely to succeed in a trial on the merits.

IT IS THEREFORE ORDERED that a Preliminary Injunction issue against the Secretary of Health, Education and Welfare, Defendant herein, and his officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them, preliminarily enjoining them from publishing notice and from terminating Plaintiff's provider agreement under the Health Insurance for the Aged and Disabled Program (Medicare) until further order of this Court, and against Defendants agents, namely the Champaign News-Gazette, enjoining

it from publishing notice of termination of Plaintiff's provider agreement until further order of Court.

Entered this 5th day of November, A. D. 1975, at 2:00 P. M.

/s/ HENRY S. WISE
Judge

Certified true copy.

JOHN P. OVALL
Clerk

(SEAL) By /s/ DALE STANTON
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois

COLE HOSPITAL, INC., a Delaware Corporation,
Plaintiff,

vs.

SECRETARY OF HEALTH, EDUCATION AND WELFARE, an Agency of the Federal Government,
Defendant.

No. 75-2-119

ORDER

This cause having come on for hearing this date on defendant's Motion for Reconsideration and both parties appearing by and through their respective counsel and the Court having heard arguments thereon, the Court finds: (1) That plaintiff, Cole Hospital, has served the Champaign County community for a number of years rendering hospital care which is valuable; (2) That plaintiff has informed the Court that on June 30, 1975, the State of Illinois extended its licensing of plaintiff, Cole Hospital, for another year until June 30, 1976; and (3) That plaintiff has informed the Court that the Illinois Health Facilities Planning Board, an Agency of the State of Illinois, is to hold a hearing on January 9, 1976, on Cole Hospital's application for a permit to build a new hospital.

WHEREFORE, it is hereby ordered that the preliminary injunction previously entered in this case be extended for another sixty (60) days and plaintiff is instructed during the interim to inform this Court what steps it is taking to resolve the alleged deficiencies which have given rise to the proposed termination of plaintiff's "provider" contract. The defendant is ordered during the interim to see what revenues it may take to allow plaintiff, Cole Hospital, to continue to operate in the community.

Dated this 22nd day of December, 1975.

/s/ HENRY S. WISE
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois

COLE HOSPITAL, INC., a Delaware Corporation,
Plaintiff,
vs.
SECRETARY OF HEALTH, EDUCATION AND WELFARE, an Agency of the Federal Government,
Defendant.

No. 75-2-119

ORDER

This cause having come on for hearing this date on the motion of plaintiff, Cole Hospital, Inc., to have the preliminary injunction heretofore entered in this cause continued until further order of Court and both parties appearing by and through their respective counsel.

WHEREFORE, it is hereby ordered, pursuant to Rule 62(c) F. R. C. P., that the preliminary injunction entered against defendant by this Court on November 5, 1975 and continued by order of this Court on December 22, 1975, is continued in full force and effect until further order of this Court.

Dated this 30th day of March, 1976.

/s/ HENRY S. WISE
U. S. District Judge

Certified true copy.

JOHN P. OVALL
Clerk

(SEAL)

By /s/ DALE STANTON
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Illinois

JEFFERSON MEMORIAL HOSPITAL ASSOCIATION, an Illinois not-for-profit organization,
Plaintiff,
vs.
F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, an Agency of the Federal Government,
Defendant.

No. 76-2-006

TEMPORARY RESTRAINING ORDER

This matter comes before the Court on Plaintiff's Motions for a Temporary Restraining Order and preliminary injunction dated January 19, 1976. Pursuant to notice personally served on the Attorney General of the United States, The Secretary, Health, Education and Welfare, and the United States Attorney for the Eastern District of Illinois, Defendants being represented by the United States Attorney for the Eastern District of Illinois, and Plaintiff being represented by Ronald Scott Mangum, Lord, Bissell & Brook, of Chicago, Illinois. The Court having heard and considered the evidence, pleadings, affidavits and oral argument submitted and presented by the parties, hereby finds that:

1. The termination by Defendant of Plaintiff's agreement to provide services under the Health Insurance for the Aged and Disabled Program (Medicare) established under Title XVIII of the Social Security Act, 42 U. S. C. §§ 1395 *et seq.*, and the publication of notice of that termination in a newspaper of general circulation in Mt. Vernon, Illinois, more particularly the Mt. Vernon Register News, will cause Plaintiff irreparable harm unless restrained and enjoined by this court.

2. The restraint and enjoining of said termination and publication by Defendant will cause Defendant little, if any, harm.

IT IS THEREFORE ORDERED, that a Temporary Restraining Order be issued against F. David Matthews, Secretary, Health, Education and Welfare, Defendant herein, temporarily restraining him from publishing notice and from terminating Plaintiff's provider agreement under the Health Insurance for the Aged and Disabled Program (Medicare) until further order of this Court, and against Defendant's agents, namely the Mt. Vernon Register News restraining it from publishing notice of termination of Plaintiff's provider agreement until further notice of Court.

IT IS FURTHER ORDERED that the Defendant show cause, if any he has, in the United States District Court for the Eastern District of Illinois in the city of Danville, Illinois on the 25th day of February, 1976, at 2:00 P. M. or as soon thereafter as counsel may be heard, why they should not be enjoined and restrained as prayed in the Plaintiff's Complaint, a copy of which is attached hereto dated the 19th of January, 1976. Defendant shall answer or otherwise plead by February 20, 1976.

Entered this 19th day of January, A. D., 1976, at 4:00 P. M.

/s/ HENRY S. WISE
Henry S. Wise
Judge

Certified true copy.

JOHN P. OVALL
Clerk

By /s/ DOROTHY WATSON
Deputy Clerk

(SEAL)

APPENDIX C

STATUTES AND REGULATIONS

28 U. S. C. § 1331(a)(1970), *as amended*, Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721, provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U. S. C. § 1361 (1970) provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

42 U. S. C. § 405(g) (1970), pertinently provides:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. . . .

42 U. S. C. § 405(h) (1970) provides:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

42 U. S. C. 1395cc(b) (accreditation of hospitals as Medicare providers) pertinently provides:

> An agreement with the Secretary . . . may be terminated . . .
>
> (2) by the Secretary at such time and upon such reasonable notice to the provider of services and the public as may be specified in regulations, but only after the Secretary has determined (A) that such provider of services is not complying substantially with the provisions of such agreement, or with the provisions of this subchapter and regulations thereunder, or (B) that such provider of services no longer substantially meets the applicable provisions of section 1395x of this title. . . . [Section 1866, Social Security Act, 42 U. S. C., Ch. 7, Supp. as amended]

42 U. S. C. 1395ff(c) (administrative and judicial review) provides:

> (c) Any institution or agency dissatisfied with any determination by the Secretary that it is not a provider of services, or with any determination described in section 1395cc(b)(2) of this title, shall be entitled to a hearing thereon by the Secretary (after reasonable notice and opportunity for hearing) to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title. [Section 1869, Social Security Act].

42 U. S. C. 1395ii provides:

> The provisions of sections 406 and 416(j) of this title, and of subsections (a), (d), (e), (f), (h), (j), (k), and (l) of section 405 of this title, shall also apply with respect to this subchapter to the same extent as they are applicable with respect to subchapter II of this chapter. [Section 1872, Social Security Act].

20 CFR 405.614(a) pertinently provides that the Secretary may terminate an agreement with a provider of services if he determines that it:

> (1) Is not complying substantially with the provisions of Title XVIII and this Part 405, or with the provisions of the agreement entered into . . .; or
>
> (2) No longer meets the appropriate conditions of participation necessary to qualify as a hospital . . ."

20 CFR 405.614(b) provides:

> (b) *Notice of termination.* The Secretary shall give notice of termination to the provider of services at least 15 days before the effective date of termination of the provider's agreement. In addition to giving notice to the provider, the Secretary shall also give notice of such termination to the public. Each notice of termination by the Secretary shall state the reasons for the termination of the provider agreement, the effective date of the termination, and the applicability of termination . . . as it relates to the services of the provider.

20 CFR 405.614(c) pertinently provides:

> (c) *Appeal by Agency or Institution.* Any provider dissatisfied with a determination terminating the Section 1866 agreement with such provider, shall be entitled to a hearing with respect to such determination (see Subpart O of this part). . . .

20 CFR 405.1501 pertinently provides:

> (a) The provisions contained in this Subpart O shall govern the procedure for making and reviewing determinations with respect to . . . :
>
> (3) The termination of the Secretary's agreement with a provider of services for cause. . . .
>
> (b) Any institution . . . dissatisfied . . . with an initial determination terminating the Secretary's agreement with it for cause * * * is entitled to a hearing thereon and, if dissatisfied with the Secretary's final decision after such hearing, to Appeals Council Review and then judicial review. . . .

20 CFR 405.1531 pertinently provides:

> (a) The request for a hearing . . . must be filed within 60 days after the date notice of an initial determination [of provider termination] . . . is received by the institution . . .

APPENDIX D

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

AFFIDAVIT IN SUPPORT OF APPELLEES MOTION TO STAY MANDATE

Ronald Scott Mangum, being first duly sworn, hereby deposes and states as follows:

1. He is the attorney for Cole Hospital Inc. and Jefferson Memorial Hospital Association, Appellees, and is personally knowledgeable of the truth of the facts stated herein.

2. On December 5, 1977, administrative Law Judge George A. Bowman issued a decision stating that Jefferson Memorial Hospital Association's existing facility substantially complied with the Medicare Conditions of Participation relating to fire safety and that the hospital's provider agreement should be continued until December 5, 1978. (A copy of this decision has been furnished to this Court).

3. On July 12, 1977, Administrative Law Judge Ed White issued a decision that Cole Hospital's existing facility failed to comply with certain portions of the Medicare Conditions of Participation relating to fire safety. (A copy of this decision has been furnished to this Court.) During April, May and June, 1978, an automatic sprinkler system was installed in all parts of the existing facility at a cost exceeding $50,000. In April, 1978, two exterior stairways were added to each end of the existing facility to provide two remote exits each to the second and third floors of the existing building, at a cost exceeding $35,000.00. On April 11, 1978, Cole Hospital commenced construction of a replacement facility scheduled to be completed by April 15, 1979. Construction is currently proceeding on the third floor (top floor) of the new hospital building.

4. On August 4, 1978, Edward A. Stec, Regional Director of Health Standards and Quality, H. E. W., wrote to Cole and Jefferson hospitals that the injunction which had prevented termination of the hospital's provider agreements had been lifted and that H. E. W. was proceeding to reinspect and, if it deemed appropriate, terminate the provider agreements (copies of letters attached).

5. On August 9, 1978, affiant, as counsel for the hospitals wrote to H. E. W. informing them that the mandate of this court had not issued and that the injunctions were still in effect. (copies of letters attached).

6. On August 17, 1978, Mr. Stec again informed the hospitals that the injunctions were lifted and that H. E. W. would proceed as indicated in this August 4, 1978 letter (copies of letters attached).

7. H. E. W. proposes to act in accordance with its regulations to reinspect the hospitals, and if it deems appropriate, publish notice and terminate the hospital's provider agreements without affording the hospitals the opportunity to respond before such publication and termination.

RONALD SCOTT MANGUM

Subscribed and sworn to before me this 18th day of August, 1978.

.....

Notary Public

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

Region V

175 W. Jackson Boulevard

Chicago, Illinois 60604

August 4, 1978

Refer to: HI:S14

Mr. Robert D. Clark
Administrator
Jefferson Memorial Hospital
909 Shawnee Street
Mount Vernon, Illinois 62864

Dear Mr. Clark:

As you are aware, the United States Court of Appeals for the Seventh Circuit has lifted the injunction which prevented us from effecting the termination of your hospital. Therefore, we have scheduled a direct federal survey of your facility during the month of August. If the results of that survey indicate that your hospital remains out of the compliance with the Medicare Conditions of Participation, we will terminate your participation in the Medicare program.

Sincerely yours,

/s/ RICHARD A. NOULT for
Edward C. Stec
Regional Director
Health Standards and Quality Office

August 9, 1978

Mr. Edward C. Stec
Regional Director, Region V
Health Standards and Quality Office
Department of Health, Education, and Welfare
175 W. Jackson Blvd.
Chicago, Illinois 60604

Subject: Jefferson Memorial Hospital Association

Re: Your letter of August 4, 1978

Dear Mr. Stec:

Mr. Jerry Neal, Administrator of Jefferson Memorial Hospital has forwarded to me your letter of August 4, 1978. In your letter you stated that the United States Court of Appeals for the Seventh Circuit has "lifted the injunction which prevented us from affecting the termination of your hospital." As I have advised your attorney, Mr. John P. Martin, the mandate of the Court has been stayed by our filing a petition for rehearing. I'm enclosing a copy of our petition for your review.

Should you have any questions, please feel free to call me.

Sincerely,

RONALD SCOTT MANGUM

RSM:bg

cc: John P. Martin
Allan Dulaney

August 9, 1978

Mr. Edward C. Stec
Regional Director, Region V
Health Standards and Quality Office
Department of Health, Education, and Welfare
175 W. Jackson Blvd.
Chicago, Illinois 60604

Subject: Cole Hospital Inc.
HI:S14

Dear Mr. Stec:

Mr. Stephen Hess, administrator of Cole Hospital has forwarded to me your letter of August 4, 1978. In your letter you stated that the United States Court of Appeals for the Seventh Circuit has "lifted the injunction which prevented us from affecting the termination of your hospital." As I have advised your attorney, Mr. John P. Martin, the mandate of the Court has been stayed by our filing a petition for rehearing. I'm enclosing a copy of our petition for your review.

Should you have any questions, please feel free to call me.

Sincerely,

RONALD SCOTT MANGUM

RSM:blg

cc: Stephen Hess
John P. Martin

August 17, 1978

Refer to: S14

Mr. Jerry Neal
Administrator
Jefferson Memorial Hospital
909 Shawnee Street
Mount Vernon, Illinois 62864

Dear Mr. Neal:

Upon receipt of your attorney's August 9, 1978 letter, we contacted our attorney to determine if any court order existed which would prevent us from surveying your facility. We have been advised by Ms. Eloise Davies from the Department of Justice and our attorney that we are free to survey your facility. Therefore, we have scheduled a direct federal survey of your facility during the month of August. If the results of that survey indicate that your hospital remains out of compliance with the Medicare Conditions of Participation, we will terminate your participation in the Medicare program.

We have furnished your attorney with a copy of this letter.

Sincerely yours,

Edward C. Stec
Regional Director
Health Standards and Quality Office

cc: S/A
KLeak
EStec
DHall
JSalla
RSMangum-Bliss and Mangum
RKordek-Regional Attorney's Office
GHolland

KLeak/ly

August 17, 1978

Refer to: S14

Mr. Stephen Hess
Administrator
Cole Hospital
809 West Church Street
Champaign, Illinois 61820

Dear Mr. Hess:

Upon receipt of your attorney's August 9, 1978 letter, we contacted our attorney to determine if any court order existed which would prevent us from surveying your facility. We have been advised by Ms. Eloise Davies from the Department of Justice and our attorney that we are free to survey your facility. Therefore, we have scheduled a direct federal survey of your facility during the month of August. If the results of that survey indicate that your hospital remains out of compliance with the Medicare Conditions of Participation, we will terminate your participation in the Medicare program.

We have furnished your attorney with a copy of this letter.

Sincerely yours,

Edward C. Stec
Regional Director
Health Standards and Quality Office

cc: S/A
KLeak
EStec
DHall
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GHolland

KLeak/ly